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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANDREA P. GARCIA,

Plaintiff and Appellant,

v.

JESUS BARAJAS BRISENO,

Defendant and Respondent.

G046221

(Super. Ct. No. 10P001466)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Barry S. Michaelson, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Andrea P. Garcia, in pro. per., for Plaintiff and Appellant.

Conforti & Carras and Michael J. Carras for Defendant and Respondent.

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Appellant Andrea P. Garcia (mother) and respondent Jesus Barajas Briseno (father) are the unmarried parents of a minor child. On mother's motion the court granted an upward modification of an existing monthly child support order from \$254 to \$378. It subsequently granted mother's motion for reconsideration on the basis she was denied the opportunity to present subpoenaed bank records that became available only after the hearing had concluded.

Following the new trial, the court issued an order in October 2011 determining father's income and reducing the child support amount to \$373 a month. In doing so it found, among other things, father averaged a \$600 monthly income benefit for the personal use of business vehicles and had 18 percent of the time with the child.

Mother filed a motion for reconsideration and then a notice of appeal from the child support order but subsequently abandoned the appeal. The court denied the motion.

Mother then once again appealed from the child support order and elected to proceed without a reporter's transcript. She contends the court abused its discretion in determining the amount of father's income, the monthly average for his personal use of business vehicles, his time with the child, and in denying her motion for reconsideration. Finding no error, we affirm the order.

## DISCUSSION

### *1. Standard of Review*

The parties disagree on the applicable standard of review. Mother contends child support orders are reviewed for abuse of discretion, while father asserts the substantial evidence review standard applies because the issues on appeal are factual.

Both are partially correct. We review a trial court's determination on a request for modification of child support for abuse of discretion and must affirm unless the record discloses prejudicial error. (*In re Marriage of Sorge* (2012) 202 Cal.App.4th 626, 640.) "We cannot substitute our judgment for that of the trial court, but only determine if any judge reasonably could have made such an order. [Citation.] Our review of factual findings is limited to a determination of whether there is any substantial evidence to support the trial court's conclusions. [Citation.]" (*In re Marriage of Chandler* (1997) 60 Cal.App.4th 124, 128.)

## 2. *Father's Income*

Regarding father's income, mother argues the court abused its discretion by not considering nearly \$35,000 in undeposited and unreported income as required by the "Bank Deposits Method" of proof. But use of that evidentiary approach is limited to prosecutions for tax evasion as "a circumstantial way of establishing unreported income. It purports to demonstrate that excess income must exist by showing excessive unaccounted[-]for bank deposits." (*United States v. Hall* (9th Cir.1981) 650 F.2d 994, 997, fn. 4; see CALJIC No. 7.91.) Mother cites no authority applying it to actions to increase child support, claiming instead the matter is one of first impression. But she did not raise it until her reply memorandum in response to father's opposition to her motion for reconsideration of the October 2011 support order and failed to provide any explanation, much less a satisfactory one, for failing to present this legal theory earlier, as required on a motion for reconsideration based on different law. (*Baldwin v. Home Savings Of America* (1997) 59 Cal.App.4th 1192, 1193, 1197-1198, 1200-1201.) Because the issue was not properly before the trial court, we decline to address it.

Mother also challenges the court's factual findings as to the amount of father's income and claims his testimony was not credible. But "[w]here no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.]" (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) Mother's citation of her motion for reconsideration from the October 11 order and supporting documents does not rebut that presumption. She does not claim insufficiency of the evidence to support the order and, in any event, we may not reweigh evidence or reevaluate credibility. (*In re Marriage of Calcaterra & Badakhsh* (2005) 132 Cal.App.4th 28, 34.)

### 3. *\$600 Monthly Income Benefit From Use of Business Vehicles*

Mother argues the court abused its discretion in finding father had a \$600 monthly benefit in income from his use of business vehicles instead of the "more reasonable amount" of \$1,158.67. But merely contending a different ruling would have been better, as mother has done, does not show an abuse of discretion occurred. Rather, "[d]iscretion is abused only when in its exercise, the trial court 'exceeds the bounds of reason, all of the circumstances before it being considered.' [Citation.] There must be a showing of a clear case of abuse and miscarriage of justice in order to warrant a reversal. [Citation.]" (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.)

Mother summarily asserts, without support, the court arbitrarily decided the \$600 amount and used a 6-month rather than the 12-month average recognized by courts to determine monthly income. Because she has not shown either that the decision was arbitrary, as opposed to merely being different from her calculation, or based on a 6-

month average, we cannot say the court's decision "exceeds the bounds of reason, all of the circumstances before it being considered." (Denham v. Superior Court (1970) 2 Cal.3d 557, 566.)

#### 4. Time with Child

Mother contends the court's finding father had 18 percent of the time with the child was an abuse of discretion and that 13.69 percent is a more accurate calculation. The contention lacks merit.

Under a parenting agreement, father was to have 33 hours on alternating weekends, 4.5 hours every Monday, two weeks during the summer, and some holiday time. As to the 33 hours, mother multiplies that by 11 months without explanation. Father presumes mother reached that number by assuming without evidence the summer weeks spent with him fall on his normal visitation weekends. But he argues even if it did, "33 hours times 11 months times 4.33 weeks per month" (not the 4 weeks a month asserted by mother because "52 weeks divided by 12 months = 4.33") divided by 2 equals 786.5 visitation hours. That divided by 8030 hours ("24 hours times 365 days divided by 12 months times 11 months") is roughly "10 [percent], as the court found." We agree.

Mother's computation is also based in part on her erroneous beliefs the parenting agreement allowed father visits 3 hours every Monday, when in fact it states he is to receive 4.5 hours, and only four weeks exist in a month, when there are actually 4.33 weeks. Logically, father's two summer weeks include two Monday visitations. Thus, his "Monday visitation hours for 11.5 months . . . would be 225[] (4.5 hours times 50 weeks.)" Because there are 168 hours in a week and a total of 8400 hours in 50 weeks, the court correctly found the Monday visitations to be approximately 3 percent.

Mother does not challenge the court's finding father's summer visits amounted to 336 hours, which divided by 8760 hours ("365 days times 24") rounds up to 4 percent. She also does not contest the court's determination of 1 percent holiday visitation. That, added to the other percentages found by the court, total 18 percent.

#### *5. Motion for Reconsideration*

Mother's final claim is the denial of her motion for reconsideration constituted an abuse of discretion. We disagree.

Code of Civil Procedure "[s]ection 1008, subdivision (a) requires that a motion for reconsideration be based on new or different facts, circumstances, or law. A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time. [Citation.]" (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.) Here, mother's motion for reconsideration states it is "based on original evidence submitted to this court. The arguments and evidence submitted in this [m]otion" can be found in her prior filings. She thus did not demonstrate any new or different facts.

As to new law, mother did not assert her new legal theory of the Bank Deposits Method of proof until her reply brief or explain why she could not present it earlier. The court did not abuse its discretion in declining to consider it. Although a court may correct its own errors as mother claims (*In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 1303), no error has been shown for it to correct.

DISPOSITION

The order is affirmed. Respondent shall recover his costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.